Supreme Court, U.S.
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No. 01-13

IN THE

Supreme Court of the United States

CONSTANTINE KOULEGEORGE,

Petitioner,

v.

STATE OF ILLINOIS HUMAN RIGHTS COMMISSION,
ILLINOIS DEPARTMENT OF HUMAN RIGHTS
and TEMPEL STEEL COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ILLINOIS APPELLATE COURT, THIRD DIVISION, FIRST DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision by the Illinois Appellate Court is at odds with this Court's decision last year in the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

2. Whether the appellate court's decision implicates Federal case law under the ADEA because the Illinois Human Rights Commission and the Courts in interpreting the Illinois Human Rights Act, follow Federal case law under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a).

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Petitioner Constantine Koulegeorge respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the Illinois Appellate Court for the Third Division, First District.

OPINIONS BELOW

The January 29, 2001, opinion of the Illinois Supreme Court, which is reported at 193 Ill.2d 587, 744 N.E.2d 285, 253 Ill. Dec. 3 (2001), is set out at Appendix D. The September 29, 2000, Illinois Appellate Court opinion which is reported at 316 Ill. App.3d 1079, 738 N.E.2d 172, 250 Ill. Dec. 208 (1st Dist. 2000), is set out at Appendix A. The November 10, 1998 per curiam decision of the Illinois Human Rights Commission converting the Recommended Order and Decision of the ALJ at the Illinois Human Rights Commission which is not reported, is set out at Appendix B. The June 12, 1998, Recommended Order and Decision of the ALJ at the Illinois Human Rights Commission which is not reported, is set out at Appendix C.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Illinois denying leave to appeal was entered on January 29, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The ADEA, 29 U.S.C. § 623(a)(1), which, in pertinent part, states that, "It shall be an unlawful for an employer — employment practice for an employer to discriminate against (1) to fail or refuse to hire or to discharge any individual or

otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age."

The Illinois Human Rights Act, 775 ILCS 5/2-102, states in pertinent part that it shall be unlawful, "For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status." The term "unlawful discrimination" includes discrimination based on age which means "a person who is at least 40 years old." 775 ILCS 5/1-103.

A. STATEMENT OF THE CASE

1. Proceedings Below

Petitioner commenced this action in the Illinois Human Rights Department which then referred it for public hearing to the Illinois Human Rights Commission. He alleged that he was terminated by Tempel Steel and replaced by a younger individual because of his age, 52.

A public hearing was held in this case on February 2-3, 1998. At the close of petitioner's case, a directed verdict was granted in favor of the respondent employer, Tempel Steel. (27a).[1] Using the *McDonnell-Douglas v. Green*, 411 U.S. 793 (1973) method of proof, the ALJ decided that there was insufficient evidence of age discrimination to require the employer to proceed with its defense and issued a Recommended Order and Decision in favor of the employer. Her written opinion to this effect was entered on June 11, 1998. (43a).

1. References in this petition to "__a" are to the record below.

The Illinois Human Rights Commission in a per curiam decision, affirmed the ALJ's finding and converted her Recommended Order into a Final Order and Decision of the Commission on November 10, 1998. (25a).

The Illinois Appellate Court affirmed the Commission by order dated September 29, 2000, holding that despite alleged age biased comments that were made on decision makers and despite the employer's pattern of terminating older workers beginning in 1990, there was insufficient evidence to require the employer to proceed with a defense under *McDonnell-Douglas.* (19a).

The Illinois Supreme Court on January 29, 2001, denied the petitioner's petition for leave to appeal. (44a).

2. Statement of the Facts

Constantine "Gus" Koulegeorge was 52 years old at the time he was discharged by Tempel. (1a-2a).

Koulegeorge first went to work for Tempel in 1968. Koulegeorge first worked as an hourly-paid press operator in 1968 and progressed to a salaried position as the production control staff assistant.

Koulegeorge was terminated by Tempel in January of 1992. (3a).

Beginning in 1990, as Koulegeorge testified at the public hearing, ageist and suspicious comments were directed at Koulegeorge by Tempel's managers, specifically by Arthur Canning and Thomas Setlik. Canning was the Manager of Human Resources at the time. Beginning in 1990,

Koulegeorge started having weekly meetings with Canning. On the days he was supposed to have meetings with Canning, Canning would come up to him in the hallways and say to Koulegeorge, "Gus, are you still here? I am surprised you are still here." (35a).

Thomas Setlik, Tempel's Quality Assurance Manager who was involved in the decision to terminate Koulegeorge, started calling Koulegeorge down to his office to tell Koulegeorge, "Gus, you get paid top dollars, we'll see what we can do about you." (35a, 38a). These comments made Koulegeorge worry that something was going to happen to him. (4a).

The employee retained instead of Koulegeorge was Tom Klawitter. Klawitter at the time was 49 years of age. (4a). Koulegeorge filed his underlying charge of discrimination with the Illinois Department of Human Rights ("IDHR") on June 8, 1992. After that, the company replaced Klawitter with Paul Resborcheck on August 28, 1992. (41a).

B. Other Witness Testimony in Koulegeorge's Case-in-Chief

1. Jacinto Gabriel

Gabriel testified that Koulegeorge was terminated due to his age based on a pattern of age discrimination Gabriel himself observed and was victimized by at Tempel. He said that he personally observed that the company was systematically getting rid of all of the "older people" including him. (5a).

2. Larry McIntyre

Larry McIntyre worked for Tempel Steel on two separate occasions, the first from May of 1979 through March of 1981, the second from February of 1989 through September of 1993. (5a). He worked for Tempel as a security officer. (*Id.*). McIntyre's date of birth is July 26, 1938. When he was terminated, the second time he worked for the company, he was 55 years old. McIntyre testified that he noticed a pattern of Tempel terminating other workers and replacing them with younger workers.

At the close of Koulegeorge's case, the ALJ granted Tempel's motion for a directed finding thereby not requiring Tempel to put on a defense.

REASONS FOR GRANTING THE WRIT

I. THE ILLINOIS SUPREME COURT IN REFUSING TO GRANT THE PETITION TO APPEAL AND THE APPELLATE COURT DID NOT FOLLOW THIS COURT'S DECISION IN THE *REEVES* CASE

This case concerns the viability of this Court's decision and opinion in the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). In that case this Court indicated that cert was necessary to resolve a conflict amongst the Appellate Court regarding what evidence was necessary to prove a case using the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) indirect method of proof. 411 U.S. at 140, 83 S. Ct. at 2104.

There this Court held that in a case brought under the ADEA, under this Court's prior precedent in *Hazen Paper*

Co. v. Biggens, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993), that the plaintiff's age must have played a role in the decision making process of the employer. 530 U.S. at 141, 120 S. Ct. at 2105.

This Court noted that there are seldom any eye witnesses to the employer's mental processes so that the *McDonnell Douglas* framework, or some variant has been employed by the courts. *Id.*

In *Reeves*, the evidence which supported the plaintiff's case involved the testimony of two individuals, Chestnut and Sanderson. They alleged performance deficiencies of the plaintiff. Sanderson was not the plaintiff's supervisor but Chestnut was. Sanderson, accepted the negative assessment of plaintiff's job performance by Chestnut and relied on it to fire the plaintiff. 530 U.S. at 144, 120 S. Ct. at 2105.

There was evidence that the reasons suggested by Chestnut were false. 530 U.S. at 144-145, 120 S. Ct. at 2105. However as this Court noted, the courts below had ignored evidence in plaintiff's prima facie case. There was evidence that Chestnut had made derogatory, ageist comments which were directed to the plaintiff. He had also singled the plaintiff out for harsher treatment than he gave to the younger employees. Even though the plaintiff won at trial, the trial court took the verdict away and the Appellate Court held that the evidence produced was not sufficient. This Court reversed. 530 U.S. at 146-147, 120 S. Ct. at 2108.

This Court in *Reeves* held that the evidence produced by the plaintiff in the court below was enough for a trier of fact to believe that the employer's offered reason for his termination was false. Further this Court held that if the

reason given is false, that could be enough to sustain a verdict for the plaintiff. 530 U.S. at 146-149, 120 S. Ct. at 2108-2109.

This Court held that the comments made, even though they were not made by the actual decision maker and even though they weren't made at exactly the time plaintiff was fired, were sufficient for the jury verdict to have stood, and indeed, were enough for the case to survive summary judgment. 530 U.S at 150, 120 S. Ct. at 2110-2111.

The comments held to be sufficient were that Chestnut had told the plaintiff that he "was so old [he] must have come over on the Mayflower," and on only one occasion had told the plaintiff that he "was too damn old to do [his] job." 530 U.S. at 151, 120 S. Ct. at 2111.

In addition, the plaintiff in *Reeves* introduced evidence that although Chestnut was not the decision maker, that Sanderson was married to him so she listened to him and was influenced by him. 530 U.S. at 151-152, 120 S. Ct. at 2111. This Court concluded that the lower courts have been far too eager to grant summary judgment motions in age cases and have been far too eager to ignore comments made by people that show an age-biased environment. According this Court reversed the decision below 530 U.S. at 153-54, 120 S. Ct. at 2112.

The facts in this case are at least as good as the facts in *Reeves*. There is evidence of age-biased comments. There is evidence of a pattern of ageist behavior on the part of the company and there is evidence sufficient for a trier of fact to reject the explanation of the employer and allow this case to go forward.

II. THIS COURT'S ADMONITION IN *REEVES* CONCERNING RULE 50 MOTIONS APPLIES TO MOTIONS FOR A DIRECTED VERDICT

In addition to all of the above, this court in *Reeves*, also noted that the lower courts erred in their application of the standard of proof necessary to support a Rule 50 post-trial motion. This Court held that the courts "disregarded critical evidence favorable to the petitioner — namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. . . . The court also failed to draw all reasonable inferences in favor of petitioner." 530 U.S. at 152-153, 120 S. Ct. at 2111.

The same could be said here. Based on the evidence produced here, the ALJ was wrong to grant a directed verdict. Indeed, under this Court's ruling in *Reeves*, an argument could be made that a verdict in favor of the plaintiff could have been entered. Therefore, the decision below must be reversed under this Court's clear precedent.

III. THIS PETITION SHOULD BE GRANTED AS IT IMPLICATES FEDERAL CASE LAW UNDER THE ADEA BECAUSE THE ILLINOIS COURTS RELY ON FEDERAL CASE PRECEDENT TO INTERPRET THE ILLINOIS HUMAN RIGHTS ACT WHICH PROHIBITS AGE DISCRIMINATION

As noted above, this case arises out of the Illinois Human Rights Act, 775 ILCS 5/2-102, which states in pertinent part that it shall be unlawful, "For any employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms,

privileges or conditions of employment on the basis of unlawful discrimination or citizenship status." The term "unlawful discrimination" includes discrimination based on age which means "a person who is at least 40 years old." 775 ILCS 5/1-103. It is a mini-ADEA like so many of the state Fair Employment Practices Acts.

The Illinois Courts and indeed the Illinois Human Rights Commission both look to Federal Court precedent to interpret the rules under the Illinois Act. *See Zaderaka v. Human Rights Commission,* 131 Ill.2d 172, 545 N.E.2d 684 (1989). Indeed, under *Zaderaka*, the Illinois Courts have adopted the Federal indirect method of proof set forth in *McDonnell-Douglas. See Southern Illinois Clinic, Ltd. v. Human Rights Commission,* 274 Ill.App.3d 840, 847, 654 N.E.2d 655, 660 (1995); *Marinelli v. Human Rights Commission,* 262 Ill. App.3d 247, 253-54, 634 N.E.2d 463, 469 (1994); *Clyde v. Human Rights Commission,* 206 Ill. App.3d 283, 291, 564 N.E.2d 265, 269 (1990).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Illinois Appellate Court.

Respectfully submitted,

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APPENDIX A — OPINION OF THE ILLINOIS APPELLATE COURT, THIRD DIVISION, FIRST DISTRICT, AFFIRMING DIRECTED VERDICT IN FAVOR OF THE RESPONDENT EMPLOYER DATED SEPTEMBER 29, 2000

APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, THIRD DIVISION

No. 1-98-4364

CONSTANTINE KOULEGEORGE,

Petitioner-Appellant,

v.

STATE OF ILLINOIS HUMAN RIGHTS COMMISSION, ILLINOIS DEPARTMENT OF HUMAN RIGHTS AND TEMPEL STEEL COMPANY,

Respondents-Appellees.

Petition for Review of an Order of the
Illinois Human Rights Commission

JUSTICE BURKE delivered the opinion of the court:

Petitioner Constantine Koulegeorge appeals from an order of respondent Illinois Human Rights Commission (Commission) dismissing his complaint for age discrimination pursuant to section 2-102(A) of the Illinois Human Rights Act (Act) (775 ILCS 5/2-102(A) (West 1992)), based on the termination of his employment by respondent

Tempel Steel Company (Tempel). On appeal, petitioner contends: (1) that the Commission did not have the statutory authority to enter a "directed finding" * dismissing his complaint; (2) he was only required to present "substantial evidence" of discrimination to defeat Tempel's motion for a directed finding; (3) and a directed finding for Tempel was not appropriate because the administrative law judge (ALJ) and the Commission applied the wrong legal standard and ignored or misconstrued certain evidence supporting the allegations of his complaint. For the reasons set forth below, we affirm.

The following facts are based on a stipulation entered into by the parties prior to the hearing before the ALJ and submitted in a "Joint Prehearing Memorandum" (prehearing memorandum). Petitioner was born on July 25, 1939, and he began working for respondent Tempel as an hourly-paid press operator in July 1968 at Tempel's motor lamination division in Chicago. Tempel's headquarters were located in Skokie.

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* We initially note that although the parties, the administrative law judge, and the Commission refer to the hearing officer's "Recommended Order and Decision" and the Commission's "Order and Decision" as a "directed finding" or a "directed verdict," these terms are not accurate as a matter of procedure where, as in this case, there is no jury for the hearing officer or Commission to "direct." See *Williams v. Chicago Osteopathic Health Systems*, 274 Ill. App. 3d 1039, 1048, 654 N.E.2d 613 (1995). However, while we use the terms "directed verdict" and "directed finding" in this opinion to refer to the agency's decision because they are used throughout the record and in the parties' appellate briefs, we do not apply the standard of review applicable to a directed finding, but rather the standard applicable to decisions by an administrative agency, as set forth in this opinion.

Appendix A

By 1970, petitioner had been promoted to dispatcher in the plant's production control department. William Schaller and Arthur Homyak were already working in the production control department when petitioner was assigned there. In 1973, petitioner was promoted to a salaried position as the production control staff assistant in the annealing department. By 1987, Schaller was the manager of the production control department, Homyak was the assistant manager, and petitioner continued to serve as the production control staff assistant. Also in 1987, Thomas Klawitter was hired by Tempel as another production control staff assistant. After he had completed his training in the various tasks performed by the production control department, Klawitter was primarily responsible for scheduling Tempel's slitting department. Petitioner was responsible for scheduling of the annealing department.

In March 1990, Tempel underwent a change of administration and began a process of corporate restructuring and review. In April 1990, following a review of the functions of the production control department, Tempel decided to eliminate both production control staff assistant positions. In 1991, Tempel employed a total of 691 people at its Chicago plant. In April 1991, Tempel laid off 79 hourly employees and 12 of the employees were over the age of 40. Tempel allowed 15 employees to transfer, 3 of whom were over the age of 40. Thomas Setlik, the project manager, had decided as part of the administrative review that began in 1990 to eliminate the two production control positions. Petitioner's position was eliminated, effective January 15, 1992, when he was 52 years old. He was informed of this decision, as directed by Setlik, by Arthur Canning, the corporate director

of human resources. Schaller was the immediate supervisor of both petitioner and Klawitter at that time. Schaller was not consulted by Setlik regarding the elimination of positions by Tempel. Klawitter was 49 years old at that time. Petitioner had previously performed the duties performed by Klawitter and had also trained him in these duties.

Klawitter remained working for Tempel until August 28, 1992, because, according to Tempel, the employee who was to assume Klawitter's job duties under the reorganization, Paul Rasborschek, who was age 54 and the manager of the slitting department, was on a disability leave of absence. Setlik also claimed that Klawitter was retained because he had been performing the slitting duties in the slitter department on a day-to-day basis while petitioner had not performed them within the last five years.

Tempel gave petitioner a severance package, which was contrary to its usual policy, which included his full salary and fringe benefit continuation for six months through July 15, 1992, and professional outplacement services at Tempel's expense. He had received a 2% merit raise in January 1991 based on his last performance evaluation before his discharge.

At the hearing on petitioner's complaint, petitioner testified that beginning in 1990, he began having weekly meetings with Canning. Canning would approach him in the hallway on the day of the meetings and say to him, "Gus [petitioner], are you still here? I am surprised you are still here." These comments started to make petitioner think that "something is going to happen to me." Petitioner also

stated at the hearing that Setlik told him, "Gus, you get paid top dollars, we'll see what we can do about you." Petitioner testified that these instances occurred shortly before he was terminated.

Jacinto Gabriel, who had worked as a dispatcher for Tempel, testified that he noticed from March 1990 through June 1991 that Tempel was "letting older people go" from the work force in the production control department. He also believed that petitioner was "let go" based on his age because Klawitter was younger than petitioner and had less seniority. He did not know Klawitter's exact age. Gabriel claimed that he did not have any other basis for believing that petitioner was subject to discrimination. Gabriel also believed that he was "let go" because of his age.

Larry McIntyre testified that he worked as a security officer for Tempel from 1979 to 1981 and from 1989 to 1993. He was 55 when he was terminated the second time. McIntyre claimed that the other security officers were also terminated except for the youngest who was in his mid-40's. He and the other guards began to notice a pattern terminating older workers. He noticed younger workers replacing older workers in the housekeeping and trucking departments after the new management took control. McIntyre further stated that the guards filed charges against Tempel with the Equal Employment Opportunity Commission (EEOC) which were still pending at the time of the hearing. McIntyre further stated that all of the guards who filed charges with the EEOC were terminated. Only the youngest guard, who was the only guard not to participate in the filing of charges with the EEOC, was not terminated. McIntyre also stated that Tempel claimed that it was "outsourcing" security guard jobs.

Appendix A

Robert Nichols, Tempel's vice president and general manager testified as an adverse witness at the hearing to the authenticity of a memorandum dated September 7, 1993, indicating that Tempel was aware the guards had gone to the EEOC before they were fired. The memorandum (petitioner's exhibit 10) was an "interoffice correspondence" based on a meeting requested by Victor Toboada, a plant protection officer, regarding "specific events taking place with the other officers." Nichols testified that he decided to terminate the guards to save money by "outsourcing" the guard positions and because of the other matters regarding inappropriate behavior by the guards listed in the memorandum as described by Toboada, such as possession of keys and access to offices, desks, and confidential information concerning pensions, salaries, and profits of the company.

Setlik testified as an adverse witness that when Tempel eliminated the position of a salaried employee, the company would give the employee severance payment rather than transfer and recall rights. He also stated that there were no other positions for petitioner to transfer to at the time his position was eliminated.

At the close of petitioner's case, Tempel moved for a directed finding. On June 11, 1998, the ALJ filed her "Recommended Order and Decision" which stated that petitioner's complaint failed to establish a *prima facie* case of age discrimination and that a directed finding for Tempel was appropriate. The ALJ, therefore, recommended that petitioner's charge and complaint be dismissed with prejudice. The ALJ's decision stated that petitioner's position,

as well as several other positions, in the Production Control Department were eliminated as a result of a review of the functions of that department in April 1990. The decision also stated that the preponderance of the evidence adduced during petitioner's case-in-chief did not sustain the complaint. The ALJ found that petitioner's testimony, regarding the alleged comments he attributed to Setlik and Canning, was not credible. The ALJ noted that petitioner had admitted in his answers to interrogatories that no comments regarding his age had ever been made to him, and she also noted that neither of the comments were included in petitioner's charge or his complaint. The ALJ further found that even if petitioner had not fabricated the comments, they were insufficient evidence of age discrimination because he failed to show that Canning had any input into the decision to terminate him and that the parties had stipulated that Tempel had decided to eliminate the production control staff assistant positions as early as April 1990. The ALJ also stated that there were valid "monetary concerns" which may have led to petitioner's termination based on his high salary due to his number of years working for Tempel, as opposed to his age, and that Setlik's comment would have been consistent with this concern.

The ALJ further found that the testimony of Gabriel and McIntyre regarding discrimination by Tempel against defendant and the other "older people" to be speculative and not credible because they could not give specific instances or dates of discrimination. It was undisputed, according to the ALJ, that petitioner was not replaced by a similarly-situated younger individual and that any of petitioner's remaining former duties which still existed after the

elimination of the position and restructuring were simply absorbed by existing personnel. The ALJ also found that Klawitter was not treated more favorably by Tempel because Tempel made the decision to eliminate Klawitter's position at the same time that it eliminated petitioner's and Klawitter was only able to remain longer with Tempel because Rasborschek, the individual who would have taken over some of Klawitter's duties, had a heart attack and respondent waited for his return before actually eliminating Klawitter's position. The ALJ stated that petitioner did not prove that he had any "bumping" rights to support his argument that he should have been allowed to "bump" Klawitter from the position he held while waiting for Rasborschek's return. The ALJ further found that the evidence indicated that Tempel had a policy of offering substantial severance to laid off workers and petitioner was not, therefore, entitled to a hourly position at the time of his discharge. The ALJ also stated that there were no other positions available at the time as the evidence showed that Tempel did not begin hiring for "some time" after petitioner's discharge.

On November 10, 1998, the Commission filed a "Notice" which stated that the Commission had "decided to decline to review the Recommended Order and Decision" of the ALJ and that it would become the "Order and Decision" of the Commission. This appeal followed.

We initially address petitioner's argument that our standard of review of the Commission's decision is *de novo*. Petitioner argues that because there is no authority allowing the Commission to enter a directed finding, we must rely on "the most analogous case law" involving summary decisions

under the Human Rights Act. Based on this analogy, petitioner maintains that because summary decisions, like a decision for summary judgment under the Illinois Code of Civil Procedure, concern questions of law, our review of the Commission's order and decision should be *de novo.*

Tempel and the Commission argue that because a hearing was held in which testimony and evidence were presented, the decision in this case is not the equivalent of a summary decision addressing questions of law. They maintain that the findings of fact made by the ALJ on their motion for a directed finding must be sustained unless they are against the manifest weight of the evidence.

The findings and conclusions of an administrative agency on questions of fact are held to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 1994). The Commission's factual findings must be affirmed unless a reviewing court concludes that they are against the manifest weight of the evidence. *Raintree Health Care Center v. Illinois Human Rights Comm'n*, 173 Ill. 2d 469, 479, 672 N.E.2d 1136 (1996). Determinations as to the credibility of witnesses and the weight to be given their testimony are reserved for the administrative agency, and it is not this court's function to substitute its judgment on those issues. *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88, 606 N.E.2d 1111 (1992).

The present case involved findings of fact following petitioner's presentation of evidence in an evidentiary hearing. The ALJ determined from the evidence and the credibility of the witnesses that petitioner had not established

a *prima facie* case of discrimination by a preponderance of the evidence. The ALJ did not enter judgment on petitioner's complaint as a matter of law, and petitioner has presented no authority supporting his contention that we should apply the *de novo* standard of review applicable to summary decisions to the decision of the ALJ and Commission in the present case. Accordingly, the applicable standard of review is whether the factual findings made by the ALJ, and adopted by the Commission, were against the manifest weight of the evidence.

Petitioner next contends that there is no statutory authority for the ALJ to have entered a directed finding before the "close of all proofs." He argues that although the Illinois Administrative Code permits "summary decisions" similar to summary judgment under the Illinois Code of Civil Procedure, there is no corresponding provision in the Administrative Code permitting the ALJ to make a directed finding. Petitioner also maintains that none of the reported cases in which the Commission has decided that it has the "right" to enter a directed finding has ever been reviewed by the Illinois appellate courts.

Tempel argues that it is illogical to require a respondent to present exculpatory evidence when the evidence presented by a petitioner is clearly insufficient to support the allegations of his complaint. Tempel also argues that because the Administrative Code permits an ALJ to render a summary decision without having held any hearing where there is no genuine issue of material fact, the ALJ must necessarily have the power after an evidentiary hearing to dismiss the complaint. The Commission adopts Tempel's argument and

further argues that because the ALJ found that petitioner failed to establish a *prima facie* case of age discrimination, it was proper for her to dismiss petitioner's complaint as the remainder of the hearing was unnecessary.

The section of the Illinois Administrative Code (Code) applicable to the Commission states, in relevant part:

> "a) Subject to the provisions of the Act and of this Part, the [ALJ] shall have full authority to govern the procedure of the hearing and to admit or exclude testimony or other evidence.
>
> b) The [ALJ] shall rule on all proper motions and objections by any party * * *." 56 Ill. Admin. Code § 5300.530.

The Illinois Human Rights Act (Human Rights Act) provides:

> "(I) Decision. (1) When all the testimony has been taken, the hearing officer shall determine whether the respondent has engaged in or is engaging in the civil rights violation with respect to the person aggrieved as charged in the complaint. A determination sustaining a complaint shall be based upon a preponderance of the evidence." 775 ILCS 5/8A-102 (West 1996).

Neither party has cited to any authority addressing the issue of whether an ALJ or the Commission may consider

and rule on a motion for a directed finding, but we note that a number of reported opinions by the Commission indicate that such motions have been considered in similar cases. See *In the Matter of Sharon Castle*, 1995 WL 715247 (Ill. Hum. Rts. Com. June 29, 1995) (sexual discrimination case). Additionally, in the recent case of *Anderson v. Human Rights Comm'n*, 314 Ill. App. 3d 35, 731 N.E.2d 371 (2000), the petitioner appealed the Commission's dismissal of her age discrimination claim pursuant to the respondent's motion for a directed verdict. The Commission's hearing officer found that the petitioner had presented evidence to support the first three elements of her *prima facie* case of age discrimination, but the evidence was insufficient to support the fourth element which required proof that a similarly situated employee who was not a member of the protected group was not discharged. *Anderson*, 314 Ill. App. 3d at 50. The *Anderson* court reversed the dismissal, finding that the petitioner's evidence was sufficient to satisfy the fourth element of her *prima facie* case because the employee who replaced petitioner was 13 years younger than the petitioner even though the employee's age still placed the employee in the protected group. *Anderson*, 314 Ill. App. 3d at 50-1. Having found that the petitioner established a *prima facie* case by a preponderance of the evidence, the *Anderson* court reversed the "directed finding" and remanded for a continuation of the petitioner's hearing to allow the respondent to rebut the presumption of discrimination. *Anderson*, 314 Ill. App. 3d at 51.

Although the authority of the hearing officer and the Commission to enter a directed finding was not directly addressed in *Anderson*, the holding in that case implicitly

affirms that a hearing officer may enter a directed finding where the petitioner has not established a *prima facie* case of age discrimination by a preponderance of the evidence. We find here, therefore, that the ALJ properly considered, and possessed the authority to rule on, Tempel's motion for a directed finding. Additionally, although the Code does not specifically mention motions for directed findings in the sections applicable to hearings before the Commission, the Code does give the ALJ authority to govern the procedure of the hearing, to control the admission of testimony and other evidence, and to rule on proper motions and objections. The Code specifically provides procedures related to summary findings, but there is no indication in any of the applicable sections of the Code that procedures not specifically mentioned are prohibited. The term "proper motions" is not defined, and we find that a motion for a directed finding is appropriate in a hearing before the Commission, especially in light of the initial burden of proof that a petitioner must satisfy in order to shift the burden of proof to the respondent. It would be unnecessary to require a respondent to present testimony or other evidence where a petitioner has clearly failed to meet its initial burden of establishing a *prima facie* case, as more fully discussed below regarding the "McDonnell Douglas-Burdine standard."

Petitioner next contends that even if the ALJ had the authority to consider and enter a directed finding, the ALJ erred by applying the wrong standard of proof. Petitioner argues that the Human Rights Act only requires that he establish a *prima facie* case by presenting "substantial evidence" of discrimination rather than by a " preponderance of the evidence" standard applied by the ALJ. He further

argues that his evidence satisfied the "substantial evidence" standard because he presented more that a scintilla of evidence of age discrimination. Tempel and the Commission contend that section 8A-102 of the Human Rights Act, applicable to hearings before the Commission, provides that petitioner has the burden of presenting evidence to sustain the allegations of the complaint by a preponderance of the evidence and that the ALJ, therefore, applied the correct standard.

As stated above, and as Tempel and the Commission correctly argue, section 8A-102 of the Human Rights Act requires that "[a] determination sustaining a complaint shall be based upon a preponderance of the evidence." 775 ILCS 5/8A-102(I) (1). See *Anderson*, 314 Ill. App. 3d at 50-51, (stating that a petitioner is required to establish a *prima facie* case of age discrimination by a preponderance of the evidence). The ALJ clearly applied the correct standard in considering the evidence presented by petitioner. As indicated by Tempel and the Commission, the statute and authority petitioner cites in support of his argument apply to reports created by the Department of Human Rights after it has investigated a charge of discrimination. More specifically, after a charge of discrimination has been filed, the director of the Department of Human Rights (Department) is required to determine from the Department's report whether there is "substantial evidence" that a civil rights violation has been committed before taking further action on the charge. This "substantial evidence" has no bearing on the standard applied at the subsequent public hearing before the Commission and, therefore, we find that the ALJ applied the appropriate standard under the statute.

Appendix A

Petitioner next contends that a directed verdict for Tempel was not appropriate because the ALJ applied the wrong "legal standard." Petitioner argues that the "*McDonnell Douglas-Burdine*" standard is no longer followed and that employees may prove their cases with circumstantial evidence as outlined in *Troupe v. May Department Stores, Inc.*, 20 F.3d 734 (7th Cir. 1994). Petitioner also argues that the evidence of "systemic disparate treatment" by Tempel that he presented at the hearing was sufficient to prove the age discrimination against himself and that both the ALJ and Commission ignored the "systemic evidence of discrimination." Some of the "systemic evidence" that petitioner claims he produced at the hearing includes:

> "- that as early as 1991, Tempel started targeting older workers for termination and unfavorable treatment
>
> - that in 1991, shortly after new management came onto the scene, there were two dispatchers working in the production control department, one age 49, the other age 34 and the 49-year-old (Gabriel) was transferred to a heavy labor job he was not qualified for and couldn't do, while the 34-year-old was allowed to remain in his position
>
> - that the security guards started noticing at the same time that a lot of the older workers were being let go or being fired, so much so, that all but one of them became fearful of their jobs and went to the EEOC to inquire as to their rights"

Petitioner further argues this evidence was sufficient to defeat Tempel's motion for a directed verdict even though some of the evidence was in the form of "subjective belief evidence" and "lay witness opinion testimony." He claims that the comments made by Canning and Setlik were also "probative" of the discrimination against himself and ignored by the ALJ and Commission. Petitioner further contends that even though the comments made by Setlik and Canning did not specifically refer to his age, as he admitted in his interrogatory answers, the comments were "relevant and probative in light of all the other evidence produced in this case." Lastly, petitioner claims that the ALJ and Commission failed to "properly apply the case law in the RIF [reduction-in-force] area" and failed to focus on the appropriate factors.

Temple and the Commission contend that the stipulations entered into by the parties and contained in the prehearing memorandum and the undisputed evidence presented at the hearing support the decision of the ALJ that petitioner failed to establish his claims by a preponderance of the evidence. They also argue that the ALJ properly found that the testimony of Gabriel and McIntyre was speculative and did not support petitioner's claims of discriminatory treatment of others or petitioner by Tempel. Tempel and the Commission further argue that Setlik's and Canning's statements to petitioner did not constitute evidence of discrimination as the statements were not related to his age, and the ALJ correctly viewed petitioner's testimony regarding these statements suspiciously based upon petitioner's admission in an interrogatory answer that he could not recall comments made to him regarding his age while employed by Tempel. Tempel and the Commission also argue,

assuming *arguendo*, that petitioner's evidence was sufficient to establish a *prima facie* case by a preponderance of the evidence, petitioner could not overcome Tempel's legitimate reasons for his termination as stated at the hearing.

Since an administrative agency is a creature of statute, any power or authority claimed by the agency must find its source within the provisions of the statute by which it is created. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 171, 613 N.E.2d 719 (1993). Our supreme court has stated that in analyzing employment discrimination cases under the Human Rights Act, Illinois has adopted the "analytical framework" set forth by the United States Supreme Court decisions addressing claims brought under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178, 545 N.E.2d 684 (1989).

The Seventh Circuit Court of Appeals has recognized that intentional discrimination can be shown by one of two methods: (1) direct evidence or (2) indirect evidence. The analytical framework for proof of intentional discrimination through indirect evidence established by the United States Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S.Ct. 1817 (1973), and adopted by the Illinois Supreme Court in *Zaderaka*, involves a three-part analysis. First, the plaintiff must establish by a preponderance of the evidence a *prima facie* case of unlawful discrimination. If a *prima facie* case is established, a rebuttable presumption arises that the employer unlawfully discriminated against the employee. The employer must

articulate, but not prove, a legitimate, nondiscriminatory reason for its decision to rebut the presumption. The petitioner must then prove by a preponderance of the evidence that the employer's articulated reason was merely a pretext for unlawful discrimination. *Zaderaka*, 131 Ill. 2d at 179. A *prima facie* case for unlawful age discrimination is established by showing by a preponderance of the evidence that: (1) the complainant is a member of a protected class (age 40 or over); (2) the complainant was doing the job well enough to meet his employer's legitimate expectations; (3) he was discharged or demoted; and (4) similarly-situated younger employees were treated materially better. *Illinois J. Livingston Co. v. Human Rights Comm'n*, 302 Ill. App. 3d 141, 153, 794 N.E.2d 797 (1998).

Intentional discrimination may also be shown by direct evidence pursuant to *Troupe v. May Department Stores Co.*, 20 F.3d 734 (7th Cir. 1994). Under this approach, a petitioner may establish his case with either direct or circumstantial evidence. *Troupe*, 20 F.3d at 735-36. The *Troupe* court recognized three types of circumstantial evidence that a petitioner could utilize to satisfy his burden of proof: (1) evidence of "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn"; (2) evidence "whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic * * * on which an employer is forbidden to base a difference in treatment received systematically better treatment"; and (3) evidence "the [petitioner] was qualified for the job in question but passed over in favor of (or replaced

by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination." *Troupe*, 20 F.3d at 736.

We initially disagree with petitioner's argument that the Commission erred in applying the "McDonnell Douglas-Burdine" standard because the "standard no longer applies in light of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 513, 125 L. Ed. 2d 407, 113 S. Ct. 2742, 2749 (1993)." Petitioner does not explain in his appellate brief how the holding in *Hicks* made the standard established in *McDonnell Douglas* no longer applicable to age discrimination cases. Our review of *Hicks* does not reveal that the *McDonnell Douglas* standard was overturned or amended by the Supreme Court in that case. In fact, recent Illinois decisions have continued to apply *McDonnell Douglas* in age discrimination cases. See *Illinois J. Livingston Co.*, 302 Ill. App. 3d at 152.

Applying the *McDonnell* standard to the facts here, contrary to petitioner's argument, we find that the ALJ's decision, adopted by the Commission, was not against the manifest weight of the evidence. The ALJ heard testimony from petitioner, his former co-workers Gabriel and McIntyre, and Setlik as an adverse witness. The record supports the ALJ's finding that petitioner did not establish a *prima facie* case of age discrimination by a preponderance of the evidence. Although petitioner testified that the comments of Canning and Setlik made him suspicious of Tempel's motives in eliminating his position, neither comment, as admitted by petitioner in his answers to discovery, made a specific

reference to his age. The stipulations and testimony demonstrated that Tempel, in reviewing the procedures of some of its departments, began a process of eliminating a number of positions and jobs in 1991. The stipulated statistics showed that the majority of hourly employees laid off were under the age of 40 and that, of the smaller group of employees who were allowed to transfer to different positions, many of these employees were over the age of 40. Although petitioner was not offered a new position, the testimony petitioner presented showed that Tempel had a policy of giving former salaried employees such as petitioner severance packages rather than transferring them or giving them recall rights. The evidence also showed that Klawitter, who had held a position similar to petitioner's, was allowed to continue working for Tempel for several more months to allow another worker, who was to assume the responsibilities of the job, time to recover from a heart attack. Moreover, any preference this might have proved was not significant evidence because Klawitter was also over 40, and only three years younger than petitioner. Klawitter's position was also eliminated at the same time as petitioner's and his employment eventually terminated as well. Petitioner's and Klawitter's job responsibilities were assumed by other workers.

The ALJ also considered the testimony of Gabriel and McIntyre regarding other alleged acts of age discrimination against truck drivers, security officers, and other employees by Tempel. The ALJ, however, found this testimony to be speculative because Gabriel and McIntyre could not provide specific facts to support their opinions. The determination of the credibility of witnesses and the weight to be given

their testimony are reserved for the administrative agency and it is not this court's function to substitute its judgment on these issues. Based on the evidence presented by petitioner, we find that the ALJ's and Commission's decision that petitioner's evidence did not establish a *prima facie* case of discrimination by a preponderance of the evidence was not against the manifest weight of the evidence.

We next address petitioner's contention that he presented sufficient evidence of direct discrimination through circumstantial evidence as discussed in *Troupe*. As we noted above, petitioner has argued that the hearing officer and Commission "misconstrued [his] evidence of systemic age discrimination," citing numerous examples in his brief. Petitioner also claims that the "statistical evidence," which we have also referred to above, also supports his argument that Tempel's actions resulted in "disparate treatment" of older workers.

Illinois has adopted the "analytical framework" set forth by the United States Supreme Court in decisions addressing claims brought under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA). *Zaderaka*, 131 Ill. 2d at 178. "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993). "When an employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Hazen Paper*, 507 U.S. at 611.

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Based on the evidence presented at petitioner's hearing, as we stated above, there was evidence in the record to support the hearing officer's and the Commission's decision that age was not a motivating factor in the termination of petitioner or the other employees at Tempel. Tempel had recently come under new management and the new managers initiated a reorganization of the company. Temple did not replace petitioner with a younger employee; Temple decided to completely eliminate petitioner's position and a comparable position held by Klawitter. There was also evidence presented that other employees, such as the security guards, were terminated in an effort to "out source" those positions and because the security officers had been involved in inappropriate behavior such as possessing unauthorized access to company records. Additionally, the statistics presented by petitioner here were insufficient to show through circumstantial evidence that Tempel's motivation in terminating petitioner was related to his age. The record supported the hearing officer's decision that petitioner failed to present evidence of a younger employee, *similarly situated* to petitioner, who received better treatment.

We also reject petitioner's argument that the hearing officer and Commission ignored or misconstrued the testimony of the witnesses, including his own. Petitioner's arguments are merely a request for us to reweigh the evidence he presented and evaluate the credibility of the witnesses. This function, however, is within the province of the ALJ and the Commission. The record indicates that the ALJ made findings of fact based on the stipulations and testimony presented and judged the credibility of the witnesses. The hearing officer did not give great weight to the testimony of the other witnesses presented by petitioner, describing disparate treatment of older employees

at Tempel, because the testimony was not based on specific factual instances. Based on this record, we find therefore that the ALJ's and Commission's decisions were not against the manifest weight of the evidence.

We briefly note that petitioner's reliance on *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir. 1989), in support of his argument that beliefs and opinions based on the perception of a witness are admissible, is misplaced. In *Hansard*, the Fifth Circuit Court of Appeals determined that an employee of the defendant employer could testify regarding his opinion that the plaintiff was terminated as part of a "youth movement" by the defendant because the employees's testimony was based on his experience with the company rather than hearsay. *Hansard*, 865 F.2d at 1465. In the present case, however, no issue was raised by the parties here regarding the admissibility of statements or testimony as in *Hansard*. Moreover, the ALJ did admit the testimony and opinions of petitioner's former co-workers, Gabriel and McIntyre. The ALJ, in fact, allowed McIntyre to testify after denying Tempel's motion *in limine* seeking to exclude his testimony. The ALJ simply did not give great weight to this testimony because it was speculative and unsupported by other facts.

Petitioner's reliance on *Hybert v. Hearst Corp.*, 900 F.2d 1050 (7th Cir. 1990), is also misplaced. In *Hybert*, the court affirmed the district court's admission of statements made by an employee supervisor to the effect that people in their 60's "are going to be replaced." The *Hybert* court found that the statements were an admission by an agent, the supervisor, of the employer and not hearsay and, therefore, admissible at trial. *Hybert*, 900 F.2d at 1053. Again, in the present case, the

testimony of petitioner's witnesses was admitted and no issues were raised regarding the exclusion of certain statements or evidence.

Similarly, petitioner's claim that the hearing officer and Commission ignored evidence of "ageist stereotypes" engaged in by Tempel managers is not supported by the record. Petitioner relies on the comments of Setlik and Canning to support this argument. As we noted, however, these comments were not age related, and we find that they do not support petitioner's claims that they also raise an inference of age discrimination. See *Huff v. UARCO, Inc.*, 925 F. Supp. 550, 555-56 (N.D. Ill. 1996).

Lastly, we briefly address petitioner's claim that even if the reduction in force (RIF) performed by Tempel was "legitimate," Tempel may still be "challenged on its failure to provide [petitioner] an opportunity to consider or be considered for other positions within the company." The record here contains evidence that salaried employees, such as petitioner, were typically not given the opportunity to transfer to another position and were instead given a severance package and benefits. Petitioner failed to present any evidence that Tempel's failure to offer him an opportunity to transfer was the result of age discrimination. The ALJ's and Commission's decision, therefore, was not against the manifest weight of the evidence.

For the reasons stated, we affirm the decision of the Commission.

Affirmed.

HALL, P.J., and WOLFSON, J., concur.

APPENDIX B — PER CURIAM OPINION OF THE ILLINOIS HUMAN RIGHTS COMMISSION AFFIRMING THE DIRECTED VERDICT IN FAVOR OF THE RESPONDENT EMPLOYER AND CONVERTING RECOMMENDED ORDER AND DECISION OF THE ALJ TO AN ORDER AND DECISION OF THE ILLINOIS HUMAN RIGHTS COMMISSION DATED NOVEMBER 10, 1998

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO(S). 1992CA3407
EEOC NO(S). 21B922371
ALS NO. 7754

IN THE MATTER OF:

CONSTANTINE KOULEGEORGE

Complainant,

AND

TEMPEL STEEL COMPANY

Respondent.

NOTICE

You are hereby notified that a three member panel of the Illinois Human Rights Commission has decided to decline to review the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.945 of the Commission's Procedural Rules,

that Recommended Order and Decision has now become the Order and Decision of the Commission.

ENTERED: November 10, 1998

GAIL M. BRADSHAW
EXECUTIVE DIRECTOR
HUMAN RIGHTS COMMISSION

D/10/8

APPENDIX C — OPINION (RECOMMENDED ORDER AND DECISION) OF THE ALJ AT THE ILLINOIS HUMAN RIGHTS COMMISSION GRANTING A DIRECTED VERDICT TO THE RESPONDENT EMPLOYER DATED JUNE 12, 1998

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

CHARGE NO(S): 1992CA3407
EEOC NO(S): 21B922371
ALS NO(S): 7754

IN THE MATTER OF:

CONSTANTINE KOULEGEORGE,

Complainant,

and

TEMPEL STEEL COMPANY,

Respondent.

RECOMMENDED ORDER AND DECISION

This matter comes before me for decision on the merits of the Complaint of Constantine Koulogeorge. A public hearing was held on the allegations of the Complaint on February 2nd and 3rd, 1998. Both parties were represented by counsel. At the close of Complainant's case on liability, Respondent's motion for directed finding was granted. Subsequently, the parties filed post-hearing initial and reply briefs. The matter is now ready for decision.

Appendix C

CONTENTIONS OF THE PARTIES

Complainant contends that Respondent discriminated against him by discharging him because of his age, contrary to Section 2-102(A) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (1992) ("Act"). Respondent contends that Complainant cannot establish a *prima facie* case on his discrimination claim.

FINDINGS OF FACT

Those facts marked with asterisks are facts to which the parties stipulated to in the Joint Prehearing Memorandum, were undisputed, or facts which were alleged in the Complaint and admitted in the Answer. The remaining facts are those which were determined to have been proven by a preponderance of the evidence at public hearing on the matter. Assertions made at the public hearing which are not addressed herein were determined unproven or were determined to be immaterial to this decision. The findings are as follows:

1. Complainant's date of birth is July 25, 1939.*

2. Complainant began working for Respondent in July of 1968 as an hourly press operator. By 1970, Complainant had been promoted to Dispatcher in the plant's production Control Department. From that time forward, Complainant never operated a press. In 1973, Complainant was promoted to a salaried position as the Production Control Staff Assistant in the Annealing Department.*

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3. Before Complainant entered Respondent's Production Control Department, William Schaller and Arthur Homyak already were working there. Schaller and Homyak were the same age as Complainant.

4. By 1987, Schaller was the Manager of the Production Control Department, Homyak was its Assistant Manager, and Complainant remained a Production Control Staff Assistant. In 1987, Thomas Klawitter was hired to be another production Control Staff Assistant. Klawitter initially was trained in the various tasks then performed in the Production Control Department, and thereafter may have rotated periodically among those tasks. However, once he was trained, Klawitter primarily had responsibility for scheduling Respondent's slitting department, whereas Complainant was responsible for scheduling the annealing department.

5. The slitting and annealing departments have distinct functions at Respondent. Essentially three departments perform distinct operations in Respondent's manufacture of motor lamination. First, the slitting department slits large coils of steel to narrower widths. Next, the press department stamps lamination out of the slit steel stock. Finally, the annealing department heats the lamination in large furnaces to improve their magnetic properties.

6. In April 1990, Respondent began a review of the functions of the Production Control Department, as a result of which several positions, including both Production Control Staff Assistant positions, were targeted to be eliminated.*

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7. According to Jacinto Gabriel, who then was an hourly Dispatcher in Production Control, Respondent first informed the Dispatchers in June 1991 that their positions were being abolished.

8. Thomas Setlik, then Respondent's Manager of Materials and Customer Service, decided also to simultaneously eliminate both Production Control Staff Assistant positions. Although Setlik reported that decision to Robert Nichols, Respondent's Vice President and General Manager for the motor lamination division, it was Setlik's decision to eliminate those jobs.

9. Setlik determined that two primary changes in the annealing department enabled Respondent to eliminate Complainant's Production Control Staff Assistant position. First, the plant was moving to a "just-in-time" system of scheduling parts for annealing, so that only about eight hours worth — instead of two weeks' worth — of material would be maintained in the annealing bank. Thus, little effort would be required to keep track of and schedule that "bank." Similarly, the annealing department instituted a new, self-effectuating procedure for reordering the packaging materials that were stored in the annealing department, making it unnecessary for Production Control to manage those materials. These two changes eliminated 75 to 85 percent of Complainant's job.

10. Setlik determined that Respondent could also eliminate Tom Klawitter's production Control Staff Assistant position, because the purchase of a computerized system for designing slitting patterns would enable Art Homyak to schedule the slitters alone, without Klawitter's assistance.

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11. However, Setlik was compelled to delay the elimination of Klawitter's position when Paul Rasborschek, who as manager of the slitter department would be Homyak's "back-up" on the computerized design system after Klawitter was gone, had a heart attack. Setlik therefore waited until Rasborschek, who was 54 years of age, had recuperated before proceeding to eliminate Klawitter's position.

12. Complainant's position was eliminated effective January 15, 1992. Complainant then was 52 years old, while Klawitter was 49 years old.*

13. By the time Complainant's position was eliminated, all the Dispatcher positions in Production Control also had been eliminated.

14. When Complainant's position was eliminated, Respondent gave Complainant a severance package including full salary and fringe benefit continuation for six months through July 15, 1992, and professional outplacement services at Respondent's expense.*

15. Klawitter continued to work until August 28, 1992, when his position also was eliminated. During that interim, Klawitter continued to perform his duties with the slitter department; Klawitter did not assume any of Complainant's former duties.

16. To the extent they remained, Complainant's former duties were simply absorbed by existing employees in the annealing department.

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17. Setlik kept Klawitter to continue his work with the slitter department while Rasborschek recuperated, rather than discharging Klawitter and assigning Complainant to work with slitters during that interim, because Klawitter was already doing the slitter work and, Setlik felt, was more familiar than Complainant with the slitter department. To Setlik's knowledge, Complainant had not worked with the slitter department for many years.

18. After Klawitter was discharged on August 28, 1992, no employees younger than Complainant remained in the Production Control Department; the only employees left there were Schaller and Homyak.

19. When Complainant's position was eliminated, Setlik did not offer Complainant the opportunity to transfer to another position in the plant because there were no other positions then available.

20. In addition, Respondent's policy with respect to salaried employees like Complainant who were laid off when their jobs were eliminated was to offer them substantial severance and outplacement benefits rather than transfer or recall rights for future hiring.*

21. Respondent did not begin hiring again for some time after Complainant was discharged, and even then it hired only for hourly shop positions.

22. In fact, in mid-1991, shortly before Complainant's position was eliminated, Respondent eliminated 100 hourly shop positions, and only 15 of the occupants of those

positions were able to transfer to other shop positions. Then, in February 1992, immediately after Complainant's discharge, Respondent eliminated another 29 hourly shop positions, and none of the employees affected then were able to transfer.

23. Of the 79 hourly employees that Respondent laid off in April 1991, only twelve (or about 15 percent) were over the age of 40. However, of the fifteen affected employees who were able to transfer, three (or 20%) were over 40.*

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (1992) ("Act") .

2. Respondent is an "employer" as defined by section 2-101(B) (1) (a) of the Act and is subject to its provisions.

3. Complainant failed to present a prima facie case of age discrimination.

4. A directed finding for Respondent is appropriate in this case.

DETERMINATION

The preponderance of the evidence adduced during Complainant's case-in-chief on liability at public hearing did not sustain the complaint.

Appendix C

DISCUSSION

Standard for Granting Directed Finding

The Human Rights Commission has the authority to consider and grant, where appropriate, motions for directed finding. *See Sharon Castle and State of Illinois, Illinois Veterans' Home at Manteno*, __ Ill. HRC Rep. __ (1989CF1805, June 29, 1995). In deciding a motion for directed finding, the trier-of-fact must apply a two-step analysis. *Ritter and McCormick & Co., Inc.*, 49 Ill. HRC Rep. 148, 164 (1989).

The trier must first determine whether, as a matter of law, the complainant has presented some evidence on every essential element of his claim. This evidence can take the form of either direct evidence or indirect evidence sufficient to establish a *prima facie* case. *McDonnell-Douglas v. Green*, 411 U.S. 793 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); adopted by the Illinois Supreme Court in *Zaderaka v. Illinois Human Rights Commission*, 131 Ill.2d 172, 545 N.E.2d 684 (1989) and the Commission. If he has not met this burden, a directed finding is appropriate. *Ritter*, 49 Ill. HRC Rep. 148, 164 (1989).

If the trier determines that complainant has met this burden, the trier must next weigh all or the evidence, including evidence favorable to the respondent, weigh credibility, and draw reasonable inferences. If this weighing process negates some of the evidence necessary for complainant to establish a *prima facie* case, a directed finding is appropriate. *Id.*

This was the standard utilized at public hearing.

Appendix C

Direct Evidence

Complainant claims that a directed finding was inappropriate because he provided direct evidence of age discrimination. Respondent contends that Complainant failed to adduce any direct evidence of age discrimination.

Direct evidence entails providing evidence which, "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989). In the employment discrimination context, direct evidence relates to what an employer did and/or said regarding a particular employment decision. Where there is direct evidence of discrimination, it is unnecessary to use the three-part *Burdine* analysis. *Gregan and Rock Island Housing Authority*, __ Ill.HRC Rep. __, (1989CF1173, June 29, 1992).

Complainant points to two alleged comments made by Respondent's management as direct evidence of ageist animus. He first points to his testimony wherein he alleged that Thomas Setlik, Respondent's Quality Assurance Manager who made the decision to terminate Complainant, stated to him: "Gus, you get paid top dollars, we'll see what we can do about you." (Tr. 56, 108). He next points to his testimony wherein he alleged that Art Canning from Human Resources remarked to him on several occasions "Gus, are you still here? I'm surprised you're still here." (Tr. 48-49).

Complainant's testimony regarding these two alleged comments was not credible. In his Answers to Interrogatories,

Complainant admitted that "[n]o comments regarding Complainant's age" were ever made to him. (Respondent's Exhibit 43.) He should be held to this admission. Furthermore, these two alleged comments were not included in either his Charge or Complaint. Accordingly, it is not credible that he should only remember at public hearing that these statements were made to him "numerous times," as he alleges. Additionally, Complainant's demeanor on the stand indicated to me that he was fabricating these two comments.

However, even if I were to find Complainant credible, as a matter of law these two comments are insufficient evidence of age discrimination. His testimony regarding comments allegedly made by Art Canning from Human Resources, is insufficient to show any age bias because Complainant failed to show that Mr. Canning had any input into Respondent's decision to terminate him. Thomas Setlik, then Respondent's Manager of Materials and Customer Service (Tr. 112), credibly testified that it was his decision to eliminate those jobs. (Tr. 169.) Complainant did nothing to rebut this testimony. Furthermore, the parties stipulated that Respondent had targeted the Production Control Staff Assistant positions to be eliminated as early as April of 1990. (Agreed Facts ¶15.) It is not unreasonable, therefore, that Canning should express surprise that Complainant was still employed in 1991.

His testimony regarding comments made by Mr. Setlik not only fails to help Complainant, as a matter of law it damages his case. Although Complainant cited the Supreme Court's decision in *Hazen Paper Co. v. Biggens*, 113 S.Ct. 1701 (1993), he apparently failed to notice that the Court

held that when a decision to fire an employee in the protected age group is motivated by monetary concerns, rather than inaccurate and stigmatizing stereotypes, that such action would not constitute age discrimination:

> On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the protected class of older workers, may have worked for a particular employer all his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."
>
> [So that] a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be __") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of inaccurate and denigrating generalization about age, but rather represent an accurate judgment about the employee — that he is indeed "close to vesting."

Appendix C

The comment, "Gus, you get paid top dollars, we'll see what we can do about you." (Tr. 56, 108), indicates that Setlik was concerned with the fact that Complainant was making a high salary due to his number of years with the company. According to Hazen, this constitutes a legitimate concern which is unconnected to age-based stereotypes. Accordingly, if Complainant was in fact terminated because he was "earning top dollars," as opposed to stereotypes about age (such as "older employees work more slowly than younger employees"), as a matter of law Respondent would not be guilty of age discrimination.

Complainant also argued that Jacinto Gabriel and Lawrence McIntyre provided direct evidence of age discrimination. Jacinto Gabriel's testimony that he thought Complainant was terminated due to age discrimination and that he could see that Respondent was getting rid of all "the older people" was nothing more than his unfounded opinion. Gabriel was unable to offer any factual basis for these opinions on cross-examination, other than his speculation. The same was true for Larry McIntyre's testimony. McIntyre testified that age discrimination accounted for firings in both the trucking department and the security department, which is where McIntyre worked. In regards to his testimony about the trucking department, I find that his testimony was based upon rank speculation. Mr. McIntyre was unable to pinpoint the dates, speculated about the ages of the individuals allegedly affected, and was only able to give the names of a couple of individuals. Additionally, the trucking department was unionized, and any layoffs went according to the union contract. (Tr. 207.) In regards to his testimony about the security department,

his testimony established a number of non-age-based reasons for Respondent's handling of the situation.[1] Mr. McIntyre's denials of wrongdoing by himself or the other affected coworkers were not credible.

For the above reasons, I find that no credible direct evidence was presented on Complainant's age claim.

Indirect Evidence

The Complainant also claims that he put forward sufficient indirect evidence to avoid a directed finding against him. Based upon Complainant's post hearing briefs, Complainant was either confused by, or disagreed with, the appropriate standard governing his burden in his case-in-chief.

Complainant is incorrect that he need not state a *prima facie* case if he has no direct evidence in his case-in-chief; in fact, the exact opposite is true. If there is no direct evidence of age discrimination, than the indirect route must be used.

The method of proving a charge of age discrimination through indirect means is well established. The indirect method requires that the complainant set forth a *prima facie* case by presenting evidence sufficient, if otherwise unexplained, to raise an inference of unlawful discrimination. *Zaderaka*, 131 Ill.2d 172, 545 N.E.2d 684. It is a failure to raise this inference which makes a directed finding appropriate.

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1. Such as sleeping on the job, property was stolen from the plant and failure to report destruction of property to Respondent.

Appendix C

To establish a *prima facie* case of age discrimination, the complainant must prove:

1. that he is 40 years of age or older;

2. that he was performing his job duties well enough to meet the reasonable expectations of his employer;

3. that he was discharged; and

4. that he was replaced by a younger individual, or a similarly-situated younger individual was treated more favorably than complainant.

Hennelly and Caterpillar, __ Ill. HRC Rep. __, (1993SA0021, July 2, 1997).

Respondent does not contest that Complainant was able to establish the first three prongs of the *prima facie* case. It is the last prong, that he was replaced by a younger individual, or a similarly-situated younger individual was treated more favorably than Complainant, that Respondent contends Complainant failed to prove.

It is undisputed that Complainant's position was eliminated and he was not replaced. (Tr. 84, 118-119.) His previous job duties, to the extent that they remained due to the restructuring of the manner in which Respondent scheduled annealing jobs, were simply absorbed by existing personnel at Respondent's plant. *Id.* Accordingly, to state a *prima facie* case, Complainant needed to show that a similarly-situated younger individual was treated more favorably than he was treated.

Appendix C

Complainant contends that a similarly- situated younger individual, Thomas Klawitter, received more favorable treatment in that he was retained in his position until August 28, 1992; eight months after Complainant had been terminated. Complainant contends that Klawitter would have continued to work for Respondent had Complainant not filed his Charge of discrimination. Additionally, Complainant contends that he should have been transferred to Klawitter's position in the slitting department.

The problem with Complainant's argument that Klawitter was only fired after Complainant filed a Charge is that in the prehearing memorandum Complainant stipulated that the decision to simultaneously eliminate both his and Klawitter's positions was made in April of 1990. (Agreed Facts ¶15.) Accordingly, Complainant cannot now argue that the decision to eliminate Klawitter's job was not made until August of 1992.

The only reason Klawitter was able to work longer, instead of being terminated along with Complainant in January, was because Paul Rasborschek, who as manager of the slitter department would be Homyak's "back-up" on the computerized design system after Klawitter was gone, had a heart attack. (Tr. 117-118.) Setlik therefore had to wait until Rasborschek had recuperated before he could eliminate Klawitter's position. (Agreed Facts ¶33; Tr. 117-118.) This constitutes a non-discriminatory reason to depart from the original plan to terminate both employees, Complainant and Klawitter, simultaneously.

Appendix C

In regards to his argument that he should have been allowed to bump Klawitter from the slitting department until Rasborschek was recovered, Complainant has provided no evidence or testimony that he had any "bumping" rights. The Respondent has no duty, under the Human Rights Act, to give the Complainant a coworker's job merely because he is older than his coworker. Complainant needed to provide evidence that younger, similarly-situated workers were allowed to bump their coworkers, or that he had bumping rights which the company refused to allow him to exercise due to his age, in order for this argument to prevail.[2]

In regards to Complainant's contention that he should have been offered an hourly position at the time of discharge, I find that Respondent had no duty to do so under the Human Rights Act. While Jacinto Gabriel testified that he was offered a shop position transfer, this individual was not similarly-situated to Complainant. Gabriel was a dispatcher in the Production Control department, which is an hourly position and not a salaried position. Respondent's policy with respect to salaried employees like Complainant who were laid off when their jobs were eliminated was to offer them substantial severance, in this case, full pay and benefits for six months, and outplacement benefits rather than transfer or recall rights for future hiring. (Tr. 1.15, 122.) In any event,

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2. I note that even if Complainant had been successful in arguing that he should have been transferred to Klawitter's job in the slitting department for eight months, this would not have done much to advance his case. Complainant would also have been replaced by Rasborschek upon his recovery. Since Rasborschek was 54 years of age, two years older than Complainant, Complainant would have been unable to establish a *prima facie* case.

there were no other positions then available, (Tr. 115, 125.), and Respondent did not begin hiring again for some time after Complainant was discharged, and even then it hired only for hourly shop positions. (Tr. 116.)

Because Complainant failed to establish a *prima facie* case of age discrimination, a directed finding was appropriate.

RECOMMENDATION

Based upon the foregoing, I recommend the instant Charge and Complaint be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: s/ Norma Barnes-Euresti
NORMA BARNES-EURESTI
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: June 11, 1998

APPENDIX D — OPINION OF THE ILLINOIS SUPREME COURT DENYING PETITION FOR LEAVE TO APPEAL DATED JANUARY 29, 2001

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

January 29, 2001

Mr. L. Steven Platt
Arnold & Kadjan
19 W. Jackson Blvd., 3rd Floor
Chicago, IL 60604

No. 90451 Constantine Koulegeorge, petitioner, v. State of Illinois Human Rights Commission et al., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 20, 2001.